No. 12042

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

ERNEST J. UARTE,

*Appellee.*

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## APPELLANT'S REPLY BRIEF.

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### I.

### The Findings of Fact Are Unsupported By the Evidence.

The appellee (Brief p. 5) relies on a presumption that appellee was free from negligence and that he exercised due care for his own safety. The appellant is entitled to the same presumption until it is outweighed by evidence of negligence. The burden of proof in this regard rested, at trial, with the plaintiff. The appellant contends that the record clearly shows that the plaintiff-appellee failed to meet this burden.

Appellee contends (Brief p. 6) that the government vehicle attempted to pass the appellee's vehicle and in doing so struck the left rear fender and wheel of appellee's au-

tomobile, blowing his left rear tire, and causing the automobile to careen across the highway. This is not in accord with the evidence. The photograph of the left rear of appellee's car [Ex. 3] shows that a considerable impact took place at that point which appellee would like to attribute to a blow from appellant's car. However, when this impact allegedly occurred, the two passengers in appellee's car were unaware of it. After considerable prodding, witness Ceferino Layana testified that he was awakened by a "kind of jerk or something" [Brief p. 11 and Tr. p. 176; witness impeached on this, Tr. p. 177], and witness Peter Badostain was not even awakened until the crash into the Golden State truck [Tr. p. 172]. Obviously then, the severe impact to the left rear fender and puncture of that tire could hardly have taken place without awakening the sleeping occupants of the car. Furthermore, there is positive proof that the damage to the left rear of appellee's car was caused by an impact against the side of the Golden State truck, because the truck was damaged at that point and the left rear of appellee's car bore distinct paint marks of the color of the Golden State vehicle [Tr. pp. 256, 257, 266, 272 and 153], and no traces of the paint color of the appellant's vehicle [Tr. p. 269]. The appellant's car likewise showed no traces of the green color of appellee's car [Tr. p. 259].

In addition, the testimony and the physical facts dispute this theory of the appellee. Had the government car cut in on the left rear of appellee's car, as contended, the force of the blow would have propelled the rear of appellee's car to the right and causing that car to spin counterclockwise and thereby causing the front of the car to approach the opposite shoulder of the road first in the course of its skid. The testimony was, however, that

appellee's car was spinning clockwise and that the rear of the vehicle reached the opposite shoulder of the road first [Tr. pp. 125, 126 and 166]. For this to occur, the appellee's car would have to have been hit by the government car on its *right* rear fender. This is not contended by appellee and has no support whatsoever in the proof.

The inferences as to speed set forth on pages 6 and 7 of appellee's brief can hardly be considered evidence especially in view of the fact that the accident occurred less than 3 miles north of Madera, on the main inland coastal highway, where side roads and road-side businesses would alter the flow and speed of traffic. The further inference as to speed set forth on pages 8 and 9 of appellee's brief in regard to the relative force of impact between appellee's car and the truck and appellant's car and the truck should be disregarded in light of clear and undisputed evidence that appellee's car hit a glancing blow in passing and that appellant's car hit head-on and was thrown back.

Appellee's challenge of the highway speed of 55 miles, under wet conditions, and his assertion that 55 miles per hour was unreasonable and imprudent is not based on any fact or testimony. Furthermore, one of appellee's passengers, Peter Badostain, placed appellee's speed "around 50 miles an hour" [Tr. p. 171]. Presumably then, appellee was also imprudent.

Appellee, at page 10 of his brief, places considerable emphasis on Don McCoy's testimony as to lights. This has been discussed at length in appellant's opening brief but it should be noted that the bunching of headlights could have appeared when appellee began to skid, even though not hit by appellant's car, because the swerving to the left of the rear of appellee's car [Tr. pp. 125, 126 and 166], would have momentarily brought the following

headlights into view along with those of appellee's car. Furthermore, the time lapse between appellee's striking the truck and causing the truck to jackknife across the road, and the time of impact between appellant's car and the truck, indicates that the appellant's car was a short but cognizable distance in the rear of appellee's car at all times.

Appellee dwells (Brief pp. 12-19) on the statements of McCoy that "one clipped the other and threw him there, or one blew a tire, or something." The testimony on this point is repetitious but this appellant believes that the transcript of *McCoy's testimony should be read as a whole.* The Court will then see that McCoy was uncertain as to what happened and that he, by his own admission, made a guess as to what took place. The acknowledgment of the above statement was forced on the witness by leading questions and the so-called "refreshing" of memory. The course of the testimony showed that McCoy has disavowed his admitted guess, made the night of the accident, as to what occurred and only testified to it when he had the record of his statement, made the night of the accident, forced upon him [Tr. pp. 130, 131, 132 and 133]. His memory did not require refreshing as he had made statements to all the numerous parties to this action and the Madera action and had only shortly before testified in the Madera trial.

Authority is cited (Appellee's Brief pp. 16, 17) to the effect that a witness may state impressions. This is not challenged. However, it should be noted that *at no time did McCoy say appellee was "clipped" unless he included that as only one of several alternatives,* to-wit, "swerved," "blew a tire," "or something."

Counsel for appellee is in error as to his reference on page 18 of his brief to alleged testimony [Tr. p. 164]

that McCoy had the lights of the approaching vehicles shining directly in his eyes. No such statement is found at page 164 of the Transcript or elsewhere in the testimony. The direct contrary was testified to by McCoy [Tr. p. 155].

At page 19 of appellant's brief testimony is attributed to McCoy [Tr. p. 149] to the effect that there was nothing in appellee's driving which should have caused a tire to blow without an impact with some other object. *Page 149 of the Transcript contains no testimony even remotely close to this statement.*

Also at page 19 appellee refers to lack of objection to McCoy's testimony by appellant. One motion to strike was made and denied but *appellant has not specified as error the admission of this testimony of McCoy,* except for the use of Rule 43(b), *but has merely pointed out that it is all clearly conclusion and guesswork and not evidentiary.*

This Honorable Court should note that even the trial judge acknowledged the weaknesses of McCoy's testimony when he said [Tr. p. 297], "*I wasn't very much impressed with the variety of McCoy's testimony.* I don't think he knew which car came across there and hit him first." (Emphasis added.)

The reference on page 20 of appellee's brief to paint on the government car as "egg-yolk yellow," in order to create an impression that it was that paint which was found on the left rear of the appellee's car, is a distortion of the testimony in that it was clearly stated, and the Court can almost take judicial notice of the fact, that Navy station wagons have blue or gray bodies and natural wood upper bodies covered with a colorless lacquer [Tr. p. 279].

Appellee's summation and theory of the accident have been sufficiently treated in appellant's opening brief and will not be further reviewed here, but it should be noted that following appellee's theory that the point of impact between appellee's car and truck was at a point 100 feet south of where the truck came to rest, and coupling that with the known fact that the appellant's car wound up 40 feet *north* of the truck, it is again obvious that the time between impacts was such that had appellant's car been travelling at the speed alleged it would have gone by without harm before the truck jackknifed, *unless it was far enough behind appellee to allow appellee's allegedly slower travelling vehicle to precede him, strike the truck, and have 57 feet of truck do a complete jackknife across the highway* before appellant's car hit the truck.

## II.

## Evidence of Speed.

Appellee and appellant are not at issue on the basic legal doctrines on the admissibility of evidence of speed. Both acknowledge that the trial court has considerable discretion in allowing evidence of speed. Appellant contends however, that *the trial court abused this discretion in the present case.*

It should be noted that the two witnesses as to speed, Roberts and Daniels, could not positively identify the car that passed them as the car involved in the wreck except to state that the car that passed them was blue and had the words "Navy" or "Navy Recruiting" on it [Tr. pp. 102, 103 and 116]. Witness Roberts admitted that in July of 1946 a considerable number of Navy station wagons were on the road in this section of the state. The bodies were not identified as those of the per-

sons seen in the station wagon that passed them [Tr. p. 103].

The appellee would liken the present case to *Dromey v. Interstate Motor Freight Service* (Appellee's Brief p. 23). Actually the situation there was quite different. In that case the cars raced for a number of miles and the car in question was shown to have been going 70 to 80 miles per hour within a mile and a half of the scene of the accident.

In *Melville v. State of Maryland,* quoted by appellee at length (Appellee's Brief pp. 24, 25), the Court indicated the conduct of the car at 9 miles was remote but it was not prejudicial because there was direct evidence of speed at *only 300 yards* from the scene of the accident.

In the present case, the testimony as to speed at 10 miles and at 5 miles referred to isolated instances. Furthermore, *this speed was noted only as the witness' car was passed by the other car,* and only for a distance of a few yards due to the darkness of the night. Anyone who has driven a car on a heavily traveled *two-lane* highway will recognize the fact that passing cars use much greater bursts of speed in passing so as to make the best possible use of openings in traffic before the oncoming traffic on the narrow road closes the gap. This is especially true at night when it is difficult to measure the distance to oncoming traffic and one usually uses more speed than necessary in order to be sure to get past and not be in danger of a head-on collision. It is therefore submitted that the fact that the testimony covered *passing speed and not travelling speed* is important on the question of remoteness.

From 5 miles out to the scene of the accident, there is *no evidence of speed.* McCoy could not estimate the speed

[Tr. p. 124]. No one else saw the cars. Appellee places great weight on his so-called mathematical deductions (Brief pp. 6, 7, 26, 27) from elapsed time (a highly uncertain calculation in light of the human inability to recollect a lapse of time accurately), even though he admits that the result of his calculations would have the government vehicle *averaging* 100 miles an hour for some period of time. It is submitted that this theorizing is not only not evidence but offends one's common sense.

The witness Roberts [Tr. pp. 99, 100] did not say that there was nothing to slow down traffic from 5 miles out to the scene of the accident, as appellee states, but said [Tr. p. 99] "there were intersections and everything. However, there was nothing to cause *me* to slow down." (Emphasis added.) This was the main highway in one of its narrowest sections and there were intersections and other traffic impediments as shown in the statement quoted above. It is submitted therefore that appellee's reference to this point (Brief p. 27) is a misstatement of the facts.

The damage to the government car is *not* a criterion as to speed. As pointed out in I above, and in the opening brief, the government car could have sustained just as much damage at 50 miles an hour as at 70 miles an hour when the road was slick and the collision was head-on. The relative damage compared with appellee's car is not out of line when the Court observes the damage to appellee's car as shown in Exhibit A and considers that appellee's car hit only a *glancing,* and *not ahead-on, blow.*

It is believed that this evidence of speed was not only remote but highly prejudicial when not traced to the scene of the accident, when no other acts of misconduct on the part of the government driver were shown, and *speed was not shown to be the cause of the accident.*

## III.

## Error in Permitting McCoy to be Called as a Witness Under Rule 43(b), F. R. C. P.

At the outset, appellant wishes to point out that McCoy was at the trial at Fresno by agreement of counsel that appellant would have the San Francisco witnesses present and that appellee would secure the attendance of those from Los Angeles [Tr. p. 38]. McCoy was not called or used as a government witness as appellee would have the Court believe. He was far more adverse to the government than to Uarte because the widows of the government driver and passenger had named him and his employer defendants in their wrongful death action at Madera. They were still defendants in that action.

Appellee asserts (Brief pp. 30, 31) that appellant has violated Rules 19 and 20 (2-d) of the Rules of Practice of this Court.

Due to the shortness of time of preparing, printing and serving this Reply Brief, appellant has been unable to verify or deny the accusation as to Rule 19. Appellant has scrupulously observed the rules and requirements of this appeal and to the best of counsel's present belief, appellee was served with the Statement of Points. However, it is submitted that appellee has not been prejudiced in any case as the *entire* record of the trial court proceedings was certified and printed, including the Statement of Points complained of. If, in fact, appellee lost an opportunity to make a further Designation of Record, there was actually nothing left to designate.

Appellant admits that, due to inadvertence, Rule 20 (2-d) was not meticulously complied with but page 20 of Appellant's Opening Brief recites that the discussion,

Court's remarks, and ruling were to be found at pages 118 to 121 of the Transcript. The objection was not pointed out specifically because the language quoted in italics on page 32 of appellee's brief was not noted as being an obvious error in the transcript until after the record had been printed, and it was then too late to have the Reporter's Transcript corrected. This statement was in fact, an objection as the second portion of the quoted sentence shows. The Court considered it as such by *overruling the objection* [Tr. p. 121; Appellee's Brief p. 34].

These objections are believed to be purely arbitrary and not well taken. It is respectfully submitted that appellee has been in no way prejudiced and that these objections should not foreclose a decision of this case on the merits

At the time of this trial there was no adversity between Uarte and McCoy and McCoy was no longer a party to this action. The Madera action had no bearing on this case. McCoy was admittedly not hostile [Tr. p. 36], and had willingly testified in the Madera action. He was therefore not an unwilling witness, as appellee well knew, and his testimony discloses uncertainty but not unwillingness. As stated above, his adversity was to the government and not to Uarte. The use of Rule 43(b), however, enabled appellee to force upon McCoy statements which his better judgment has since convinced him were ill-advised and untrue (see part I above). This ruling therefore proved highly prejudicial as far as the government was concerned.

The trial court held that McCoy could be examined as an unwilling witness and, contrary to appellee's statement (bottom p. 35 of his Brief), as an adverse party when the Court said, as appellee himself quoted on page 34 of his Brief, "I think, moreover, that he can be cross-

examined under Rule 43 by virtue of the fact that he was a party to this action."

As stated above, appellant *did object* to this witness being called under Rule 43(b), and the trial court took cognizance of the objection, though appellee's counsel seeks to take advantage of an obvious error or misstatement in the Reporter's Transcript in the statement attributed to appellant's counsel (Appellee's Brief p. 36). A reading of that statement will convince the Court that the first portion of that sentence is meaningless unless considered with the balance of the sentence as constituting an objection. Counsel for both parties, at the trial, had argued the point in every sense as an objection. The Court treated it as such. Appellee's contention merely seeks to obscure and confuse the issue.

At page 38 of appellee's brief, appellee states that the use of McCoy's statement, made the night of the accident, was suggested by the United States Attorney, referring to Transcript, pages 41 and 42. This Court is invited to read those pages of the transcript in light of his statement. The United States Attorney suggested the authentication of the Madera trial transcript [Tr. p. 41]. Mr. McKnight suggested authentication of the statements taken the night of the accident [Tr. p. 42].

Appellant's repeated replies to the numerous misstatments of appellee's counsel, pointed out in this brief, may seem trivial but it is believed that this Court should be aware of these matters where they tend to obscure the issues.

## IV.

## The Trial Court Erred in Overruling Objections to the Findings of Fact.

This point has been covered in Appellant's Opening Brief. Appellant merely contends that the evidence does not support the theory of the accident set forth in the Findings, and that the statements of the Court at the time of the argument, as revealed in the transcript, indicate that the Court could not state what happened. However, he did indicate that he didn't follow appellee's theory of the case as shown by the statements quoted on pages 22 and 23 of Appellant's Opening Brief.

## Conclusion.

This is a case with only two living witnesses (The McCoys). Mrs. McCoy didn't know anything about what took place, and he the Court disbelieved. Even with this witness' testimony no negligence was shown. Without it, there is nothing. The appellee has failed to carry the burden of proof and prove negligence by a preponderance of the evidence, or at all. After all the discussion in these briefs, the same question still remains unanswered, "*What act of negligence* by the government driver proximately caused this accident?"

Respectfully submitted,

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